PUBLIC PROSECUTOR

v.

KHOO BOO HOCK & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 47(58)-33-84]
24 APRIL 1989

CRIMINAL PROCEDURE: *Section 39B(1)(a) of the Dangerous Drugs Act 1952 - Trafficking - Discovery under s. 27 of the Evidence Act 1950 - Crucial importance of the actual questions put by the police witness to the accused - Which led to the discovery of the drugs - Failure to produce the diary of the witness - Doubt as to whether accused had mere knowledge of the presence of the drugs or had hidden them.*

The two accused in this case were charged with trafficking in heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The police party, on information received, raided two dwelling houses known as '153' and '215'. The two accused persons were found in house No. 153. As a result of questioning the two accused persons, the raiding party recovered drugs.

The prosecution's case depended mainly on the evidence of purported information from the two accused which led to the discovery of the drugs, under s. 27 of the Evidence Act 1950.

What is significant in this case is that although the police witness who questioned the accused did make a record of what transpired in a book, it was never produced in Court nor was any reason given for the glaring omission.

Held:

[1] The prosecution must prove beyond reasonable doubt that the actual questions put to the accused in order to find out precisely what information was intended to be conveyed by the accused, which led to the discovery of the drugs.

[2] A contemporary record of what really passed between the police and accused was of particular importance.

[3] There was doubt as to whether the accused had mere knowledge of the presence of the drugs or had hidden them.

[Both accused persons acquitted and discharged.]

Cases referred to:
Haw Tua Tau v. PP [1981] CLJ (Rep) 11
Ragunathan v. PP [1982] 1 MLJ 139
Tai Chai Keh v. PP [1948-49] MLJ Supp 105
Lim Kah Wan v. PP [1985] CLJ (Rep) 530
PP v. Lai Ah Bee [1974] 2 MLJ 74
Chan Pean Leon v. PP [1956] MLJ 228
Sum Kum Seng v. PP [1981] 1 MLJ 244
Chang Kim Siong v. PP [1968] 1 MLJ 36
Munusamy v. PP [1986] 2 MLJ 257

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2)
Evidence Act 1950, s. 27

For the 1st and 2nd accused - S. Asamaley & Chua Keng Hock; M/s. Mohideen & Asamaley, Penang and Chua & Co., Penang

For the public prosecutor - Abdul Karim bin Jalil, DPP Penang

JUDGMENT

Edgar Joseph Jr J:

These two accused persons who were brothers were jointly prosecuted before me upon the following charge:

> That you jointly on 10 January 1984 at about 12.00noon at house No. 215 Reclamation Area, Weld Quay, in the District of Georgetown, in the State of Penang, did on your own behalf traffic in a dangerous drug, to wit 65.90 grammes of heroin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and that you have thereby committed an offence punishable under s. 39B(2) of the said Act.

For brevity and convenience, I shall, unless the context otherwise requires, refer to the two accused persons - as I did at the trial - as A1 and A2 respectively.

According to the evidence led by the prosecution, on 10 January 1984, at about 9.30 a.m., ASP Yunos bin Ngah Lazim (PW2 - Yunos, for short) then an officer attached to the Cawangan Anti Dadah, Penang, was at his office when he received certain information on the telephone and, without further ado, summoned a team of his men - eight in all, including Inspector Charles Lebong (PW6 - Charles, for short) and Acting Sergeant Tiew Chen Tin (PW3 - Tiew, for short). As the informer was not called, I had, of course, to disregard all evidence as to the contents of that information, it being hearsay.

Having briefed his men as to their respective roles in a raid he was proposing to conduct on two dwelling houses known as 153 and 215 Reclamation Area, Weld Quay, Georgetown ("153" and "215" for short), he divided his team into two groups - the first, which he himself led, consisted of Tiew and three others of the rank and file, and the second, led by Charles, consisting of two men, also of the rank and file.

Yunos and his entire team of men left the office at 11a.m. that day arriving at the scene concerned some twenty minutes later and, as they did so, they split into the two groups aforesaid, with Yunos and his group entering 215 and Charles and his group entering 153.

On entering 215, Yunus disclosed his identity to the occupants present in the house - who consisted of five Chinese adults, one male and four females. He next assembled them together in the centre hall, and proceeded to "go through their identity cards", and, as he did so, about 10 to 15 minutes later, Charles came in to report that he had recovered some drugs (not the subject matter of charge) "believed to be heroin from house 153" and also "that he had arrested three persons i.e., A1, A2 and their father".

As for the circumstances under which Charles came to recover those suspected drugs, it is necessary to peruse the record of his testimony. This shows that while Yunos was conducting the raid on premises 215, Charles did likewise at premises 153. Having identified himself to the occupants (who included A1, A2 and their father, Khoo Boon Peng) there, he proceeded to assemble them in the hall and to conduct a search of the premises which proved to be fruitless. However, on searching the area some three feet just outside these premises, near a duck coup, concealed under some rubble, he recovered about ten tubes, which he believed to contain heroin. He then showed these recoveries to A1, A2 and their father and questioned them as to who the same belonged to, but they denied knowledge of them. Charles then proceeded to premises 215 and, on arrival there, informed Yunus of the results of his search.

As I have already noted, the contents of the tubes concerned did not however form part of the drugs the subject of the charge.

Upon hearing this, Yunos proceeded straightaway to 153 which was situated some 20 to 25 yards from 215; the two houses directly facing each other, as appears from the photographs P14B and P14A.

On arrival at 153 - it was then about 11.45a.m. - Charles handed over A1 and A2 (who were handcuffed to each other) to Yunos. The latter then testified that he "took A1 and A2 a certain distance away from the house (153), with Cpl. Tiew - near a tree, in-between the two houses." (See the tree in the foreground shown in the picture P14B).

Yunos further testified, and I quote him, in view of the obvious importance of this part of his testimony:

There with Tiew as interpreter, I asked A1 and A2, in Bahasa Malaysia, 'Mana lagi peh hoon?'. I believe Tiew interpreted this to them in Chinese. But they kept quiet.

I repeated the same question a number of times.

I then said to A1 and A2, if they did not wish to speak or tell where the other drugs were hidden, then I would have to take their father to the police station.

Then I saw A1 and A2 talking to each other. According to Yunos, A1 then gave a reply to this question, though only after it was repeated and they were told that if they did not speak, then their father would have to be taken to the police station. That reply was interpreted by Tiew as follows:

"There are more drugs in the house 215", adding "that was all".

As a result, A1 led Yunos to 215 and, in particular, to a store room there, shown in the picture P14C. On arrival there, Yunos said that A1 "indicated the door using his mouth".

The party, consisting of A1, A2, Yunos and Tiew, then entered the store room.

In the store room, Yunos again questioned A1 and A2. He asked them in Bahasa Malaysia a question, in words to the following effect: "Mana tempat peh hoon?" which he believed was duly interpreted by Tiew to them.

Yunos continued: "I then saw them talking to each other"; Tiew interpreted what passed between A1 and A2 at this stage. Tiew told Yunos that A1 was asking A2 "to show where the drugs were hidden because he had already shown the room".

And then, describing the recoveries Yunos said: "A2 pointed with his left hand to the plank floor of the store room, just beside him. I then removed two loose planks.

I then found underneath two planks - two packages wrapped in Chinese newspaper.

I opened the first package and found three plastic packets believed to contain heroin.

I then opened the other package and found ten plastic packets which I believed to contain heroin." That was the version of Yunos as to his interrogation of A1 and A2 which resulted in the recoveries of the offending exhibits.

The contents of the thirteen plastic packets were, upon analysis by the Government Chemist, confirmed to be 65.90 grammes of heroin as defined under s. 2 of the Dangerous Drugs Act 1952, ("the Act") and constituted the subject matter of the charge.

I must now advert to the testimony of Tiew, the Sergeant who acted as interpreter when Yunos interrogated A1 and A2.

I shall omit formal and introductory parts of this witness' evidence, and concentrate on his version of what transpired during the interrogation resulting in the recoveries concerned.

Referring to the events under the tree, he said this:

Yunos asked (A1 and A2): 'Mana lagi barang awak orang simpan'. And I interpreted that in Hokkien to both A1 and A2.

At this point, the witness repeated the question put by Yunos to A1 and A2 in the Hokkien dialect, which the Senior Chinese Interpreter Mr. Lim interpreted into English as "Where are your things kept?"

And then, Tiew continued: A1 and A2 did not answer. Yunos repeated the question to A1 and A2.

A1 and A2 then pushed each other. Finally, A1 led us to house 215". Later, under cross-examination, Tiew said that just before this A1 had said "I will take you".

And then, describing the events in the store room, Tiew said:

Again Yunos questioned A1 and A2 as before. I interpreted this to them.

At that time both did not answer. Yunos repeated the question several times. Yes, I interpreted this to A1 and A2.

A1 and A2 pushed each other.

A1 said to A2 he had led us to the place, now it was up to A2 to show the place. Yes I interpreted that to Yunos.

Finally, A2 pointed towards floor with his left hand. Yunos lifted the plank and found 2 packages wrapped in newspaper.

The witness then went on to describe the recovery of the drugs the subject of the charge, the recovery by Yunos of a pistol and ammunition from a punching bag and by DPC Nathan of three Samurai swords from the space between the ceiling and the roof - all in the store room.

The prosecution had also adduced evidence to show that some three months before the police raid A1, A2 and members of their family who consisted of their parents, and brothers and sisters had in common with several other families been occupying 215 for several years and that their father had constructed the store room without planning permission and without the consent of the owner. Thereafter, however, they had shifted to 153, leaving behind some discarded belongings and, for some time thereafter, - it is not clear for how long this was - had been continuing to use the toilet just next to the store room. The store room, however, appears to have been accessible to all the occupants as there was no evidence that it was locked at any time.

At the close of the case for the prosecution, it was obvious that the main plank in the case against A1 and A2 consisted of evidence of purported information leading to discovery under s. 27 of the Evidence Act 1950 as deposed to by Yunos and Tiew. It was equally obvious that there were very material differences in the testimony of these two witnesses as to what the interrogation was which led to the recoveries concerned. Whilst Yunos' version regarding

this part of the case did not necessarily give rise to the inference that A1 and A2 had hidden the offending exhibits in the store room and thus had custody or control over them, even though they must have had knowledge of their presence there, Tiew's version, if believed, went much further and could give rise to such inference, and, if so, would be sufficient to attract the presumptions of possession and trafficking under s. 37(d) and (da) of the Act respectively.

In these circumstances, at the close of the case for the prosecution, applying the principles enunciated in the oft quoted case of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 followed in the Federal Court case of *Ragunathan v. PP* [1982] 1 MLJ 139, I did not then proceed to evaluate the credibility or reliability or the accuracy of the recollection of the witnesses for the prosecution, in particular Yunos and Tiew, but instead, left suspended these questions until after the conclusion of the case for the defence and after hearing final addresses.

Having directed myself as aforesaid, I called upon the defence of A1 and A2 and they both elected to give evidence on oath. There were also called in support of their case a number of witnesses. However, in the view I take of the evidence adduced by the prosecution, which I shall presently evaluate, I do not propose to embark upon an elaborate examination of the defence evidence and will content myself in giving only an outline thereof and making, where appropriate, general findings thereon.

In a nutshell, the case for the defence was a denial that either A1 or A2 had led the police party to the store room from hence the offending exhibits had been recovered, and consequently, a denial that they or either of them had given any information leading to the discovery of the same. In particular the case for A1 and A2 was that they knew nothing of the offending exhibits before their recovery by the police and, a denial that they were interrogated, under the tree aforesaid or near or in the store room.

Accordingly, it was suggested, during cross-examination of the prosecution witnesses by Counsel for the defence that the group of police personnel led by Yunos had made two separate searches of premises 215 and that during the course of the first search, the offending exhibits might have been recovered without any assistance from either A1 or A2. The defence called certain witnesses to give verisimilitude to these suggestions and these were Madam Ang Kim Hiah (DW6), an occupant of premises 215, who it was said was washing clothes, Madam Ng Paik Suan (DW5), another occupant, of premises 215, who was in her cubicle with her boyfriend (later her husband) Teh Boon Peng, when the police struck. Incidentally, Teh was also arrested by the police and taken to the police station along with A1, A2 and their father. Also called by the defence was Madam Ang Kim Hioh, a neighbour, who claimed that from the compound of her house which was within yards of premises 215, she was able to observe A1 and A2 being led from premises 153 to premises 215 along the pathway shown in the photograph P14B, and that at no time did the party stop under the tree.

Furthermore, it was the defence case that neither A1 nor A2 had any knowledge of the offending exhibits recovered by the police party from the store room which was accessible not only to the many occupants of premises 215 but also to many outsiders who came to worship at an alter there. Not only that, the defence sought to show that the store room area was generally freely accessible to people in the neighbourhood and even to boat people since premises 215 stood partly on stilts which stood in the sea.

I do not propose to discuss the evidence adduced by the defence but I must observe that it was manifestly clear that the store room was indeed accessible to many persons including A1 and A2. This observation was reinforced by my visit to the *locus in quo* in the presence

of A1, A2, their Counsel and the learned Deputy, due allowance having been made by me for changes in the permanent features as deposed to by certain members of the police party.

It will suffice, however, if I make plain my findings of fact and my understanding of the legal principles, relevant to the issues which arise for decision; in doing so, some repetition will be inevitable.

In the first place, I find as a fact that Yunos did interrogate A1 and A2 under the tree and that in consequence A1 said to Yunos either, "There are more drugs in the house" or "I will take you", and then led Yunus to the store room and, on arrival there, following further questioning by Yunos, A2 did point to the floor there, following which Yunos lifted the two planks and recovered from underneath the offending exhibits.

In the second place, it is well settled law that evidence to the effect that an accused has pointed an object to the police, if it is admissible at all, is really of little value and is often prejudicial to the accused unless the information which led to the discovery is disclosed at the same time. (See the Federation Court of Appeal case of *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105, 108.) In saying this, I do not overlook the proposition that statements in this context can be extended to include actions such as pointing out or other mannerisms. (See my decision in *Lim Kah Wan v. PP* [1985] CLJ (Rep) 530, 535.)

Thirdly, in the context of the circumstances of the present case, what is of crucial importance is the evidence of the actual questions put by Yunos under the tree which caused A1 to say (according to Yunos): "There are more drugs in the house" or "I will take you" (according to Tiew) and then to lead the police party to the store room, and the subsequent questions put by Yunos in the store room which caused A2 to point to the floor there from underneath which the offending exhibits were recovered. Without it being proved beyond reasonable doubt what exactly those questions were, it is not possible to infer what the information intended to be conveyed by A1 and A2 was. In particular, it would not be possible to say whether they merely had knowledge of the presence of the offending exhibits under the floor boards of the store room, and so were merely assisting the police in their recovery by indicating someone else's guilt; even, perhaps, that of their own father, who it will be recalled had built the store room and was himself arrested at the same time as they were, or if they were indicating that they or either of them had hidden the offending exhibits there.

It is settled law that mere knowledge of the presence of an article in any place, without something more can never constitute possession for purpose of the criminal law. (See *PP v. Lai Ah Bee* [1974] 2 MLJ 74).

As was well put by Thomson CJ in *Chan Pean Leon v. PP* [1956] MLJ 228, at 239 col. 1,

> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edn., p. 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
> >
> > To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is

> a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

Now, I have, in the course of reviewing the, evidence for the prosecution, drawn attention to the different versions given by Yunos and Tiew as to the questions put by the former to A1 and A2 through the interpretation of the latter, during the interrogation under the tree and in the store room. In my opinion, these differences even though they might be due to differences in hearing, understanding or recalling are for the reasons I then indicated, most material. The issue which now arises for decision is what is the effect of such differences on my evaluation of the testimony of Yunos and Tiew.

In relation to this part of the case, Yunos and Tiew were testifying about individual incidents in the course of a raid under conditions of some excitement which were inherently unlikely to be kept in the memory years after the event.

As I had observed in the unreported case of *Tai Mei Yuen v. PP* (Penang High Court Criminal Trial No. 13/82):

> It hardly needs emphasis that the human power of recollection, especially for the spoken word, can be notoriously liable to error and, especially is this so, when it relates to events of a routine nature, of a few moments duration which occurred some three years ago, in the life of a busy officer. Moreover, where, as here, the issues are of the utmost gravety, it is of the first importance that the statement alleged to have been made by the accused is proved beyond all reasonable doubt. I need hardly say that irrespective of however convinced in its own mind, the Court may be of the guilt of the accused, its findings must be based upon the evidence and nothing else.

In my opinion, Yunos and Tiew have advanced as actual recollection what were really attempts at retrospective reconstruction. In such circumstances, a contemporary record of what really passed between Yunos and A1 and A2 both under the tree and in the store room would have been of particular importance. (See *Sum Kum Seng v. PP* [1981] 1 MLJ 244). It is significant that although Yunos said that he did make a record of what transpired in a book the next day, the same was never produced nor any reason vouchsafed to this Court for the glaring omission.

In all the circumstances, I am not satisfied beyond reasonable doubt, as to what precisely the information intended to be conveyed by A1 and A2 was which led to the discovery of the offending exhibits in the store room. It follows, therefore, that evidence of those recoveries with the assistance of A1 and A2, is of little value, since it merely affords proof of their knowledge thereof. Apart from that, there was not other evidence connecting or tending to connect them with the offence charged. Accordingly, I hold that the presumptions under s. 37(d) and (da) of the Act which I had invoked at the close of the case for the prosecution, relying upon the principles enunciated in *Haw Tua Tau's* case, have been rebutted.

Looking back, when, as here, the evidence for the prosecution did not disclose that the accused persons were in the actual physical possession of the offending exhibits, the inference relied upon by the prosecution as establishing guilt must be correctly construed and the conclusions inferred must be capable of only one construction, namely the guilt of the accused persons. As Spencer Wilkinson J said in *Tai Chai Keh v. PP* (*ibid*) at p. 108,

"Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted." And, similarly, Pike CJ (Borneo), speaking for the Federal Court in *Chang Kim Siong v. PP* [1968] 1 MLJ 36 said:

> The onus on the prosecution when the evidence is circumstantial is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused.

In these circumstances, had it been open to me to evaluate the testimony of Yunos and Tiew at the close of the case for the prosecution - a step which appears to be authorised by the Supreme Court decision in *Munusamy v. PP* [1987] CLJ (Rep) 221 - then I would not have even called for the defence. But relying instead on the Privy Council case of Hau Tua Tau followed by the Federal Court in *Ragunathan v. PP* (*ibid*) I felt that I had no option but to call for the defence for the reasons hereinafter adumbrated.

In the result, I acquit and discharge both the accused persons. I direct that all exhibits be released to the police for disposal after expiry of the appealable period if there is no appeal.

Also found at [1990] 1 CLJ 971